COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1500

ARI SOROKEN, trustee,[1]

vs.

CONSERVATION COMMISSION OF FALMOUTH.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Ari Soroken (Soroken), as trustee of the AMS Revocable Trust (trust), appeals from the judgment of the Superior Court affirming a decision by the conservation commission of Falmouth (commission) to deny the construction of an elevated walkway and viewing platform on his property. We affirm the judgment.

Background. The trust owns beachfront property located at 77 Fay Road in Falmouth (property). A footpath along the southern border of the property provides direct beach access. Soroken sought to construct an elevated wooden walkway approximately 175 feet long and four feet wide in place of the footpath. The walkway would lead to a sixteen foot by sixteen

[1] Of the AMS Revocable Trust.

foot viewing platform. Soroken filed a notice of intent (NOI) with the commission outlining his proposal.

After two public hearings in July and August 2018, the commission voted to deny the NOI. The commission's decision rested on its conclusion that the project violated both the Massachusetts Wetlands Protection Act (act), G. L. c. 131, § 40, and the Falmouth wetlands regulations (regulations). In its written decision dated August 22, 2018, the commission made the following pertinent findings. The elevated walkway, which required a building permit to construct, constituted a structure that was located in a velocity zone to land subject to coastal storm flowage. Under the regulations, a new structure constructed in that zone is presumed to have a significant or cumulative adverse effect on protected resource areas -- a presumption that Soroken did not overcome. The project also required construction on a coastal bank in a velocity zone in direct contravention of the regulations. Finally, the project proposed to impermissibly clear vegetation within the velocity zone.

On October 2, 2018, Soroken brought an action in the nature of certiorari in the Superior Court pursuant to G. L. c. 249, § 4. He also appealed the denial under the act to the Department of Environmental Protection (DEP). See Hobbs Brook Farm Prop. Co. Ltd. Partnership v. Conservation Comm'n of

Lincoln, 65 Mass. App. Ct. 142, 142-143 (2005) (demonstrating process by which denial of project may be reviewed by Superior Court and DEP). On January 25, 2019, the DEP issued a superseding order of conditions (SOC), concluding that although the project was partially located on protected coastal lands, it nevertheless comported with the act and was permissible.

On March 22, 2019, the parties filed cross motions for judgment on the pleadings pursuant to Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974). Before the hearing on that motion, Soroken moved for summary judgment, see Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002), on the ground that the SOC preempted the commission's finding that the project was impermissibly located on a coastal bank. The commission opposed the motion and also filed a cross motion for summary judgment.

The judge granted the commission's motion for judgment on the pleadings. Addressing Soroken's various claims, the judge first decided that she could not conclusively determine whether the project was located on a coastal bank on the basis of the administrative record before it. With respect to the commission's finding that the project would impermissibly disturb vegetation, the judge rejected Soroken's argument that his plan would merely cut the vegetation. Finally, the judge concluded that the commission's "structure" finding was reasonable. The judge declined to address Soroken's motion for

summary judgment and corresponding preemption argument because it was not necessary to do so. This appeal followed.

Discussion. On appeal, Soroken claims that (1) the trial court judge improperly declined to address the merits of his motion for summary judgment, and (2) the commission made factual findings that were not based on substantial evidence and erroneously interpreted the regulations. For the reasons that follow, we reject these claims.

We review an order allowing a motion for judgment on the pleadings de novo. Commonwealth v. Fremont Inv. & Loan, 459 Mass. 209, 212 (2011). Our review of the commission's decision, however, varies according to the nature of the action. See Forsyth Sch. of Dental Hygienists v. Board of Registration in Dentistry, 404 Mass. 211, 217 (1989). "In the context of this review of a conservation commission denial of a permit, we ask whether the commission's action was arbitrary or capricious, based upon error of law, or unsupported by substantial evidence." Conroy v. Conservation Comm'n of Lexington, 73 Mass. App. Ct. 552, 558 (2009). An agency's selection between two conflicting evidentiary views will not be disturbed on appeal as long as that selection was reasonable. Conservation Comm'n of Falmouth v. Pacheco, 49 Mass. App. Ct. 737, 739 n.3 (2000). We defer to the commission's reasonable interpretation of its

bylaws. Nelson v. Conservation Comm'n of Wayland, 90 Mass. App. Ct. 133, 134 (2016).

1. The preemption claim. The commission's denial of the NOI was based on three distinct grounds: (1) the project was located on a coastal bank, (2) the project proposed to clear vegetation in a prohibited manner, and (3) the project involved the creation of a new structure on land subject to coastal storm flowage. The DEP's decision related only to the first ground. Therefore, even if we were to determine that the judge improperly declined to reach Soroken's motion for summary judgment, there exist two additional and independent grounds on which the commission's decision rested. Because either was sufficient to deny the NOI -- a point Soroken concedes -- and Soroken's claims with respect to those grounds fail for the reasons explained infra, we decline to address the merits of Soroken's preemption claim.[2]

2. The clearing vegetation finding. Turning to the commission's findings, Soroken first argues that the finding regarding clearing vegetation in a protected area was

[2] Soroken also argues (along with his preemption claim) that substantial evidence did not support the conclusion that the project was located on a coastal bank in a velocity zone. The trial court judge rejected this argument because the exhibit on which Soroken relied was not part of the administrative record, and therefore, not properly before the court. Because we affirm the judgment on the grounds set forth in this opinion, we take no position on this claim.

unsupported by substantial evidence and legally erroneous. Specifically, he contends as a factual matter that the project proposed only to trim vegetation as opposed to clearing it outright, and, as a legal matter, the commission incorrectly interpreted section 10.18 of the regulations. We disagree.

The finding challenged by Soroken reads as follows. "The project proposes to clear vegetation within the velocity zone, on and within the No Disturbance Zone A to a coastal bank, and the No Disturbance Zone to a coastal dune, coastal beach and land under ocean." Substantial evidence supports this finding. Section 10.18 explains the importance of maintaining natural vegetation: "Naturally vegetated resource area buffers (buffers) reduce the adverse impacts of adjacent land uses to wetlands. A buffer of land in a naturally vegetated condition protects an adjacent wetland, in part, by reducing runoff; absorbing nitrate, phosphorous, and other chemical pollutants; by filtering suspended sediment; and by stabilizing banks and channels." The regulations require that a vegetative area located in a no disturbance zone be kept in its natural condition.[3] See, e.g., FWR 10.18(2)(d); 10.18(4); 10.18(7)(a).

Soroken identifies meeting minutes where his landscape designer explained the use of "flo-thru" decking for the walkway

[3] It does not appear that Soroken challenges whether the project is located in whole or in part within a "no disturbance zone" as set forth in the regulations.

and stated a desire to promote healthy vegetation to suggest that the commission's finding was not based on substantial evidence. On the other hand, contrary evidence established that dense vegetation enveloped the space between the house and the beach, and that the project required flush cutting of existing shrubs. It is clear that the regulations generally require buffer areas to remain in their "naturally vegetated condition", which means in part "an area on a . . . parcel of land . . . that is left in a natural, undisturbed vegetative state" (emphasis added). FWR 10.04. Therefore, the commission had substantial evidence before it that the project would not leave the protected area in its natural vegetative state as required by the regulations. See McGovern v. State Ethics Comm'n, 96 Mass. App. Ct. 221, 227 (2019) ("Substantial evidence means such evidence as a reasonable mind might accept as adequate to support a conclusion" [quotation and citation omitted]).

Soroken also claims that the commission's interpretation of the regulations was legally erroneous because the project was permitted under at least two regulatory exceptions. The judge below declined to address this claim because it had not been raised before the commission. On the basis of our review of the administrative record, we likewise do not see where this claim was raised before the commission. Consequently, we decline to review it in the absence of exceptional circumstances not

present here. See Springfield v. Civil Serv. Comm'n, 469 Mass. 370, 382 (2014).

3. The "structure" finding. Finally, Soroken challenges the commission's findings that the applicable regulation "states the construction of new structures in a velocity zone shall [be] presumed to have a significant or cumulative adverse effect on the protect[ed] resource area values" and that he had "not overcome the presumption of significance."[4] He contends that as a matter of statutory interpretation, the proposed walkway was not a "structure" within the meaning of the regulations.

Generally, velocity zones of land subject to coastal storm flowage sometimes endure hazardous flooding and wave impact in order to dissipate wave energy and protect areas landward of velocity zones from storms and flooding. See FWR 10.38(1). Section 10.38(3)(b) of the regulations provides that the construction of, among other things, "new structures" within these zones are presumed to adversely affect protected areas. Although the term "structure" is not defined, the regulations state that the presumption applies to "[n]ew structures, including buildings, sheds and garages." FWR 10.38(3)(b)(1). Another provision prohibits the construction of new structures

[4] The record supports the determination that a portion of the project is located within a velocity zone of land subject to coastal storm flowage.

and "[f]oundations other than open pilings or columns" when that activity alters the land's ability to provide storm damage protection. FWR 10.38(4)(d). The commission concluded that the walkway was a "structure" within the regulations because it required a building permit to construct.

Relying on both the plain meaning rule and the canon of noscitur a sociis, Soroken argues that because the general term "structures" as set forth in section 10.38(3)(b)(1) is followed by the specific terms "buildings, sheds and garages," the construction of an elevated wooden walkway is excluded thereunder. An agency's interpretation of a regulation stands unless its interpretation is "arbitrary, unreasonable or inconsistent with the plain terms of the rule itself" (citation omitted). H.N. Gorin & Leeder Mgt. Co. v. Rent Control Bd. of Cambridge, 18 Mass. App. Ct. 272, 276 (1984). Here, a reasonable reading of section 10.38(3)(b)(1) is that the broad term "structures" is not limited to the enumerated list that follows it. Immediately following the word "structures" is the word "including." The commission reasonably concluded that the list of structures following the word "including" constituted a nonexhaustive list of examples sufficient to encompass a large, wooden walkway. Cf. Adoption of Yadira, 476 Mass. 491, 493 (2017) (similarly rejecting narrow reading of Federal regulation).

Moreover, the canon of noscitur a sociis does not render the proposed walkway something other than a "structure" under the regulations. See People for the Ethical Treatment of Animals, Inc. v. Department of Agric. Resources, 477 Mass. 280, 287 (2017) (noscitur a sociis means that "ordinarily the coupling of words denotes an intention that they should be understood in the same general sense" [citation omitted]). Taking Soroken's interpretation wholesale, the terms "structure" and "including" would be superfluous because only the construction of buildings, sheds, and garages would be prohibited. Principles of statutory interpretation counsel against that result. See Donis v. American Waste Servs., LLC, 485 Mass. 257, 266 (2020).

In sum, the commission's findings were supported by substantial evidence and their reasonable interpretation of the regulations is entitled to our substantial deference. See

Rodgers v. Conservation Comm'n of Barnstable, 67 Mass. App. Ct. 200, 208 (2006).

Judgment affirmed.

By the Court (Wolohojian, Neyman & Lemire, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: November 9, 2020.

[5] The panelists are listed in order of seniority.